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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-1655

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

FARMER'S HOME MUTUAL INSURANCE COMPANY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

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DIVISION I

The petitioner Insurance Company of North America respectfully prays that a writ of certiorari issue to review the judgment of the Washington State Court of Appeals, Division I entered in this proceeding on 31 July 1978.

OPINION BELOW

The Washington Court of Appeals opinion reported in 20 Wn. App. 815, 583 P.2d 644 appears

in Appendix A. No opinion was given by the Washington Supreme Court.

JURISDICTION

The Washington Court of Appeals judgment was entered on 31 July 1978. INA's Motion for Reconsideration was timely filed and denied on 6 September 1978. A timely Petition for Review was filed on 3 October 1978 with the Washington Supreme Court and a denial entered on 2 February 1979, 91 Wn.2d 1014, __P.2d __. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), U.S. Constitution, Art. III, §2 cl. 1[1], Art. VI, cl. 2[2].

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[1]"The Judicial Power shall extend . . . .to all Cases of admiralty and maritime Jurisdiction. . . ."

[2]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

QUESTIONS PRESENTED

1. Whether a state court can apply different law than a federal admiralty court would in a case involving concurrent admiralty jurisdiction.
2. Whether a state court can decline to apply federal admiralty law construing a marine insurance policy because the insured vessel is a pleasure yacht and not a commercial vessel.

STATEMENT OF THE CASE

Farmer's Home Mutual Insurance Co. (Farmer's) insured Mr. and Mrs. Robert Lindrud under a homeowner's policy which provided personal liability coverage for bodily injury occurring on their Mercer Island property. Insurance Company of North America (INA), insured the Lindrud's yacht under its yacht policy containing a P & I clause which stated.

> If the assured shall by reason of his interest in the insured yacht become liable

> to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages or reasonable expense arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the yacht hereby insured, that is to say: . . . bodily injury . . . .

The Lindrud's 50 ft. yacht is usually moored at a Lake Washington dock which is part of the residential premises located on the Mercer Island property which was insured by Farmer's. Lake Washington interconnects with Puget Sound via the Lake Washington Ship Canal and at all times material hereto is navigable in fact by commercial and recreational vessels. Lake Washington waters are navigable waters of the U.S. and within the admiralty and maritime jurisdiction of the United States. The Code of Federal Regulations applies to the operation of bridges crossing Lake Washington, 33 C.F.R. §§117.800, 117.801.

On 6 August 1973, Mr. and Mrs. Clifford Thorson went on a cruise accompanied by the Lindruds. Upon return to the Lindruds' dock, Mr. Lindrud and Mr. Thorson secured the mooring lines and then talked on the shore near the slip for the yacht.

After 20 or 30 minutes, Mr. Lindrud returned to the vessel to ascertain that the electrical switches had been turned off. Mr. Thorson also returned to the vessel. During the 20 to 30 minute period, the wives had remained aboard the yacht to clean up. Mr. Thorson was nearby when Mrs. Lindrud was ready to disembark and extended his hand to assist Mrs. Lindrud step down a ladder located on the side of the boat. As she stepped onto the pier, Mr. Thorson stepped back into the utility well on the dock which had been left uncovered. Mr. Thorson fell, injuring a rib and finger. The utility well was located on a 5 ft. pier extending over the water from a concrete bulkhead. When the yacht was moored, one disembarked the yacht by climbing down a ladder to the edge of the bulkhead next to the utility well.

Thorson filed a verified complaint for personal injuries which did not mention the yacht nor the activities at the end of the cruise. Thorson only alleged that he fell off a dock situated on the Lindruds' property and that:

> Said fall was due entirely to a dangerous and hazardous condition on defendant's premises and to the negligence of defendant Robert M. Lindrud in maintaining the same.

Farmer's defended the lawsuit and incurred settlement costs, including attorney fees, totaling $2,341.44. INA refused to defend or pay any part of the settlement on the ground that its policy did not cover this accident.

Farmer's brought this action against INA to recover its settlement costs. Farmer's alleged that INA's yacht policy covered the accident, and both parties agree that if the P & I clause in the yacht policy applied to this loss, INA had primary coverage and must reimburse Farmer's[3]. Both parties sought summary judgment on the agreed facts. The trial court concluded that the yacht policy did not cover the loss, and the summary judgment was entered for INA. Farmer's appealed and the court of appeals reversed the trial court.

Petitioner INA raised federal admiralty questions at the trial level (King County Superior

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[3]Appendix A, p.3

Court). In its Memorandum Brief in support of Motion for Summary Judgment, INA argued that Lake Washington was a U.S. navigable waterway used by pleasure and commercial vessels, that the court had to apply federal admiralty law as would an admiralty court, and that the federal law construing the liabilities "in respect of the vessel" was dispositive of the case. The trial court granted INA Summary Judgment without stating the precise reasons.

The same federal admiralty questions were again raised in INA's brief in the Washington Court of Appeals. The federal law was considered but not followed because the court of appeals opined that there was no well-established rule in the non-commercial field and therefore "the interpretation of marine insurance policies is left to the states." Appendix A, p.4.

After entry of the court of appeals judgment reversing the trial court, INA filed a Petition for Review again contending that federal admiralty law was applicable and setting forth the specific United States cases.

Following the court of appeals opinion distinguishing commercial vessels from yachts, INA's Petition for Review also contained additional federal admiralty cases which applied admiralty principles to cases involving yachts. (Pet. for Rev. pp 12-14).

REASONS FOR GRANTING THE WRIT

1. The Washington Court of Appeals Has Decided a Federal Question of Substance In a Way Probably Not In Accord With Applicable Decisions of This Court

This Court has historically held that a marine insurance policy is within the admiralty and maritime jurisdiction of the United States courts. Insur. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 20 L. Ed. 90 (1870) and more recently Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).

Earlier in this century, this Court stated that the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court. Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259, 42 S. Ct. 475, 66

L. Ed. 927 (1922). In the Wilburn case, supra, at 314, it was stated: "And States can no more override such judicial rules validly fashioned than they can override Acts of Congress." Justice Reed's dissent succinctly stated:

> One rule of laws stands unquestioned. That is that all courts, state and federal, which have jurisdiction to enforce maritime or admiralty substantive rights must do so according to federal admiralty law.

Wilburn, supra at 327.[4]

In the case sub judice, the Washington court of appeals recognized that the federal cases cited by INA held that the P & I clause in the subject INA policy would be inapplicable to losses incurred

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[4]Also cited in footnote No. 6 of Justice Reed's dissenting opinion in the Wilburn cases were: Watts v. Camors, 115 U.S. 353, 6 S. Ct. 91, 29 L. Ed. 406; Garrett v. Moore-McCormack Co., 317 U.S. 239, 243, 63 S. Ct. 246, 87 L. Ed. 239; Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-410, 74 S. Ct. 202, 205, 98 L. Ed. 143; Madruga v. Superior Court, 346 U.S. 556, 561, 74 S. Ct. 298, 301, 98 L. Ed. 290; Maryland Casualty Co. v. Cushing, 347 U.S. 409, 413-419, and concurring opinion 423 et seq., 74 S. Ct. 608, 610-613, 615, 98 L. Ed. 306. Cf. The Armar , 2 Lloyd's List Rep. 95, 101 (N.Y. Sup. Ct. 1954). See 9 Benedict, Admiralty, 55, n. 77.

under similar circumstances involving commercial vessels.[5] Appendix A. p.4. In all of the cases cited in footnote 5, the courts recognized the principle that either the vessel, its crew, or its owner must be at fault with respect to the vessel itself. Insurance coverage cannot be afforded the insured simply because the vessel happened to be there.

No federal admiralty court would have made an exception in this case because a 50 foot yacht was the vessel and not a 50 foot tug. Other cases have arisen in which federal admiralty courts have applied admiralty principles to cases involving non-commercial vessels or yachts. A yacht was the

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[5]Lanasse v. Travelers Ins. Co., 450 F.2d 580 (5th Cir. 1971), cert. denied, 406 U.S. 921, 32 L. Ed. 2d 120, 92 S. Ct. 1779 (1972); Dow Chemical Co. v. Tug Thomas Allen, 349 F. Supp. 1354 (E.D. La. 1972); Employers Mut. Liab. Ins. Co. v. Aetna Ins. Co., 254 F. Supp. 263 (E.D. Mich. 1966), Wedlock v. Gulf Mississippi Corp., 554 F.2d 240, 242 (5th Cir. June 1977) is a similar case but was reported after argument before the court of appeals.

subject of litigation in Delta Supply Co. v. Liberty Mutual Insur. Co., 211 F. Supp. 429 (S.D. Tex 1962) and the court applied principles relating to constructive total loss and hull coverage.

Principles concerning abandonment, constructive total loss and cost of repair were applied in a yacht loss in Jeffcott v. Aetna Ins. Co., 129 F.2d 582 (2d Cir. 1942). Also see Pacific Indemnity Co. v. Hugh Sussex "Yacht Duet", 1967 A.M.C. 1144 (D. Ore. 1967) and Wigle v. Aetna Cas. & Surety Co., "Yacht Rowdy", 1959 A.M.C. 2270 (E.D.S. Div. Mich. 1959).

In other categories of maritime law, admiralty principles developed in a commercial context are applied to pleasure vessels when there is admiralty jurisdiction. Maritime lien, Bromfield Mfg. Co. v. The Brown, Smith & Jones, 117 F. Supp. 630 (D.C. Mass. 1954); navigation, Rowe v. Brooks, 329 F.2d 35 (4th Cir. 1964); salvage, Milton v. The Blue Goose, 91 F. Supp. 114 (D.C. Va. 1950), rev., 188 F.2d 285 (4th Cir. 1951); Lancaster

v. Smith, 330 F. Supp. 65 (D. Ala. 1971). Furthermore the Lindruds' 50 foot yacht must comply with the Inland Navigation Rules promulgated by the Coast Guard. 33 C.F.R. §§ 80-01-80.45, parts 86, 87; 33 U.S.C. §151.

INA submits that given the facts of this case, if a federal admiralty would find that the INA policy does not provide coverage, a state court action must yield the same result. Carlisle Packing Co. v. Sandanger, supra. Even if there were no federal cases applying admiralty insurance principles to yachts, INA contends that a state court cannot decline to apply clearly stated precedent simply because a yacht was involved.

The opinion below conflicts with prior law, and in conflicting with the uniformity principle. justifies the grant of certiorari to review the judgment below.

2. The Decision Below Misinterpreted Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955)

The distinction made by the court of appeals is not in keeping with the spirit and intent of

the Wilburn Boat case, supra. When Wilburn was decided, this Court concluded that there was no judicially established federal rule which was applicable and therefore resorted to an existing Texas statute to decide the case. (348 U.S. at 316) In this instance, there was no applicable statute or regulation in existence. It was also a case of first impression for the Washington courts.

Commentators have criticized Wilburn and suggested that it has created a nightmare for insurers and lawyers. See Gilmore & Black, The Law of Admiralty, 2d ed, pp. 68-71, and H. R. Baer, Admiralty Law of the Supreme Court, 3d ed, pp. 383-390. Both authors recognize the need for further clarification of its meaning.

Numerous legal principles have been established by the federal admiralty courts relating to marine insurance, salvage, liens, and navigation. All are often inter-related. The opinion below implicitly means that in pleasure vessel cases of concurrent admiralty jurisdiction, state courts are

free to disregard established principles, although the federal courts apply them. The correctness of such a policy should be reviewed by this Court prior to its further expansion.

CONCLUSION

The decision below raises significant and recurrent problems in the resolution of admiralty principles as they relate to pleasure vessels. For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Washington Court of Appeals.

Respectfully submitted,

GERALD W. GELFAND
Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

FARMERS HOME MUTUAL INSURANCE COMPANY,	)	
Appellant,	)	No. 4922-1
	)	DIVISION ONE
INSURANCE COMPANY OF NORTH AMERICA,	)	
Respondent.	)	FILED July 31, 1978

DORE, J. -- This case concerns the coverage of a protection and indemnity (hereafter P & I) clause in a yacht insurance policy.

FACTS

Farmers Home Mutual Insurance Company insured Mr. and Mrs. Robert Lindrud under a homeowner's policy which covered bodily injury occurring on their Mercer Island property. Insurance Company of North America (INA) insured the Lindruds under a yacht policy containing a P & I clause which stated:

> If the assured shall by reason of his interest in the insured yacht become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages or reasonable expense arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the yacht hereby insured, that is to say: . . . bodily injury . . .

The Lindruds' yacht was usually moored at a Lake Washington dock located on the Mercer Island property insured by Farmers.

On August 6, 1973, Mr. and Mrs. Clifford Thorson went on a cruise accompanied by the Lindruds. Upon returning to the Lindruds' dock, Mr. Lindrud and Mr. Thorson secured the mooring lines and then talked on the shore near the slip for the yacht. After twenty or thirty minutes, Mr. Lindrud returned to the vessel to check whether the switches on the vessel had been turned off.

During this time, their wives remained on the yacht and cleaned the galley. Mr. Thorson was nearby when they were ready to leave, and he extended his hand to assist Mrs. Lindrud step down a ladder located on the side of the boat. As she stepped onto the pier, Mr. Thorson stepped back into a utility well which had been left uncovered. He fell and injured a rib and a finger.

The utility well was located on a five foot pier extending over the water from a concrete bulkhead. When the yacht was moored, one alighted from it by climbing down a ladder onto the edge of the bulkhead next to the utility well.

Thorson filed a verified complaint for personal injuries which did not mention the yacht nor the activities at the end of the cruise. He only alleged he fell off a dock situated on the Lindruds' property and that

> said fall was due entirely to a dangerous and hazardous condition on defendants' premises and to the negligence of defendant Robert M. Lindrud in maintaining the same.

Farmers defended the lawsuit and incurred settlement costs, including attorney's fees, totalling $2,301.44. INA refused to defend or pay any part of the settlement on the ground that its policy did not cover this accident.

Farmers brought this action against INA to recover its settlement costs. Farmers alleged that INA's yacht policy covered the accident, and both parties agreed that if the P & I clause in the yacht policy applied to this loss, INA had primary

coverage and must reimburse Farmers[1]. Both parties sought summary judgment on the agreed facts. The trial court concluded that the yacht policy did not cover the loss, and summary judgment was entered for INA. Farmer appeals.

ISSUE

The sole issue is whether the P & I clause of the yacht policy covered the Lindruds in a suit for damages arising from injuries suffered when a guest aboard the yacht stepped into an open utility well on the Lindruds' dock while assisting Mrs. Lindrud disembark from the yacht.

DECISION

INA contends that Thorson's complaint only alleged facts tending to show a defective condition on the dock and, therefore, it had no duty to defend the lawsuit. The duty to defend is determined by the allegations in the complaint, but when as here, they inadequately describe the character of the claim, the unalleged underlying facts must be examined. Insurance Co. of North America v. Insurance Co. of the State of Pennsylvania, 17 Wn. App. 331, 334, 562 P.2d 1004 (1977). INA's duty to defend and pay requires an analysis of all of the facts and is not limited to those matters recited

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[1] INA's P & I clause was covered by a "pro rata" provision which prevails over the "excess clause" in Farmers' policy. General Ins. Co. of America v. State Farm Ins. Co., 75 Wn.2d 200, 449 P.2d 391 (1969). A primary insurer that stands aloof from a pending lawsuit upon the basis of a unilateral but erroneous determination that its policy does not provide coverage must reimburse a secondary insurer for its costs in settling the claim within policy limits. Western Pacific Ins. Co. v. Farmers Ins. Exchange, 69 Wn.2d 11, 18, 416 P.2d 468 (1966).

in the injured party's complaint. Ins. Co. of North America, supra; Yakima Cement Products Co. v. Great American Ins. Co., 14 Wn. App. 557, 563, 544 P.2d 763 (1975).

INA argues that we are bound by federal admiralty law which consists of several cases holding P & I clauses inapplicable to losses incurred under similar circumstances involving commercial vessels. Lanasse v. Travelers Ins. Co., 450 F.2d 580 (5th Cir. 1971), cert. denied, 406 U.S. 921, 32 L. Ed. 2d 120, 92 S. Ct. 1779 (1972); Dow Chemical Co. v. Tug Thomas Allen, 349 F. Supp. 1354 (E.D. La. 1972); Employers Mut. Liab. Ins. Co. v. Aetna Ins. Co., 254 F. Supp. 263 (E.D. Mich. 1966). The United States Supreme Court has never addressed this issue, and no court has considered it in the context of the private, non-commerical use of pleasure craft. We reject INA's argument because, at least in the non-commercial field, there is no well-established federal rule, and without such a rule, the interpretation of marine insurance policies is left to the states. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 315-21, 99 L. Ed. 337, 343-46, 75 S. Ct. 368 (1955); Berkeley v. Fireman's Fund Ins. Co., 407 F. Supp. 960, 965 (W.D. Wash. 1975).

INA urges us to adopt the logic of the federal cases in our decision. Under their rationale, the act causing the loss herein would be deemed that of the Lindruds in their status as owners of the pier and utility well (rather than as yacht owners) because the yacht was only incidentally connected to the accident. Under this analysis there would be no coverage under a P & I clause which provided reimbursement only for liability incurred by reason of the insured's interest in a vessel.

Farmers argues that the logic of the federal decisions should not be adopted because the P & I clause is fairly and reasonably susceptible to two different interpretations and is, therefore,

ambiguous. Morgan v. Prudential Ins. Co. of America, 86 Wn.2d 432, 545 P.2d 1193 (1976). It is Farmers' further contention that the yacht policy could reasonably be construed to protect the yacht owner under the facts of this case.

The federal cases found no ambiguity in similar P & I clauses, and we must not strain to find an ambiguity in INA's policy where there is none. United Pac. Ins. Co. v. McCarthy, 15 Wn. App. 70, 73, 546 P.2d 1226 (1976). The argued ambiguity in the P & I clause flows from the difficulty with the meaning of the word "interest". It is a word of the most general meaning whose interpretation depends upon the circumstances in which it is used. Farmers Ins. Co. v. United States Fidelity & Guar. Co., 13 Wn. App. 836, 841, 537 P.2d 839 (1975). We must determine whether the private, noncommercial context in this case reasonably and fairly permits the interpretation of the P & I clause suggested by Farmers. If so, we must adopt it even if the insurer intended another meaning. Morgan v. Prudential Ins. Co. of America, supra.

To determine its meaning, the P & I clause must be viewed in light of the entire contract and then be construed in a manner consistent with the apparent object and intent of the parties. If the clause is found to be ambiguous, the intent of the insurer does not control, Morgan v. Prudential Ins. Co. of America, supra, at 434-35, and it must be given the interpretation that the average man purchasing insurance would give it. Ames v. Baker, 68 Wn.2d 713, 716, 415 P.2d 74 (1966).

At the time of the injury, all parties were involved in activities necessary to properly leave the yacht at the end of a cruise. Such activities included docking, securing the mooring lines, cleaning the galley, checking all the switches, and climbing down the ladder attached to the yacht. It was while assisting Mrs. Lindrud as she climbed down the ladder that Mr. Thorson stepped into the open utility well on the pier. We hold that under

these circumstances the owners of a noncommercial yacht would reasonably view their resulting liability as one arising by reason of their "interest" in the insured vessel.

Written decisions concerning pleasure craft are sparse, and marine insurance law has developed largely in the context of commercial shipping interest. California Continuing Education of the Bar, California Pleasure Boating Law, 347-48 (1963). Commercial shippers have been purchasing P & I insurance for years and are familiar with the extent of its traditional coverage. It is unreasonable to expect the non-commercial yacht owner to seek insurance protection for the same reasons, with the same expectations, and with the same knowledge of the marine insurance industry as commercial shippers.

Our decision does not convert the P & I clause into general liability insurance. It merely recognizes that the courts will not blindly apply esoteric commercial marine standards to noncommercial yacht insurance. If ambiguities arise, we must resolve them consistent with the reasonable expectations of the average insurer.

We hold that INA's policy provides coverage, and we direct entry of summary judgment for Farmers in the amount of $2,301.44.

Reversed and remanded.

/s/ Dore, Fred, J.

WE CONCUR:

/s/ Callow, J.

_____

ANDERSEN, A.C.J. (concurring in the result). The central issue in this case is not which of two insurance companies should pay, but whether Insurance Company of North America (INA) can properly deny coverage for the loss under its yacht insurance policy. The injured party had been a passenger on the yacht. At the time of his injury, he was engaged in assisting another person to alight from the yacht. His bodily injury claim was therefore within the coverage of INA's yacht insurance policy covering claims or damage "arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the yacht hereby insured, that is to say: . . . bodily injury . . ."

/s/ Andersen, A.C.J.
Andersen, A.C.J.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION I

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION I

SUMMARY OF ARGUMENT

The petitioner, Insurance Company of North America (INA), asserts that the Court of Appeals, Division I for the State of Washington has refused to follow controlling Admiralty Law in its construction of a yacht policy. It is well settled that in the field of marine insurance contracts, state law will govern in all instances except where there is a clearly established federal rule. In the circumstances presented here, no admiralty rule clearly controls, and the state court was free to and did interpret the policy according to general contract and insurance principles.

FACTS

The parties to the underlying action, two husbands and wives, had been on a pleasure cruise for a few hours in the evening aboard a 50 foot yacht. This was a purely social visit, and at the conclusion of the brief cruise, the couples returned to the moorage. The slip consisted a concrete area and short pier located in the front yard of the defendant Lindruds' home on Lake Washington. The accident occurred approximately one-half hour after the vessel had been secured. Mr. Thorson, who was standing on the five-foot pier over the water, extended his hand to help Mrs. Lindrud off the boat and stepped back, at the same time, into an uncovered utility (water faucet) well, which was recessed in the pier, used to service the vessel. He fell and was injured.

Farmers, the Lindruds' homeowner insurance company, settled Mr. Thorson's claim and brought this action to recover on the primary INA yacht coverage for settlement costs and attorneys' fees, which together totaled $2,341.44.

The applicable phrase in the INA policy provides coverage for damages for which the insured shall become liable "by reason of his interest in the insured yacht".

The Washington Court of Appeals, Division I, following established precedent in the state (which requires the yacht to be only causally connected with, but not the proximate cause of, the accident for coverage) held that the insured did become liable for damages for bodily injury "by reason of his interest in the insured yacht". Thus the yacht insurance, as well as the homeowner's insurance, was applicable. Because of the "other insurance" clauses in the policies, the INA policy was primary. The court further found that

no controlling federal admiralty authority existed on the construction of the phrase in the INA policy in the context of the facts here presented.

LAW AND ARGUMENT

Following *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), the cases are in agreement that state law controls the interpretation of a marine insurance policy unless there is established controlling admiralty authority already in existence. *Navegacion Goya, S. A. v. Mut. Boiler & Mach. Ins.*, 411 F. Supp. 929, (S.D.N.Y. 1975).

> The Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 1955, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337, 1955 A.M.C. 46, reversing this Court, 5 Cir., 1953, 201 F.2d 833, 1953 A.M.C. 284, set out the now familiar principle applicable in the maritime insurance situations that, in the absence of federal legislation or a conflicting rule of law judicially established by the Federal Courts, state law would apply to the regulation of marine insurance matters. See, also, *Irwin v. Eagle Star Insurance Co.*, 5 Cir., 1972, 455 F.2d 827, 829. With respect to the issues to be decided in this case there is no firmly established regime of federal law and consequently we find ourselves controlled by Louisiana law.

Walter v. Marine Office of America, 537 F.2d 89, 94 (5th Cir. 1976).

Although a contract to insure a ship is maritime and within admiralty jurisdiction,

> That, however, does not determine whether the interpretation and application of the policy terms are to be governed by state or maritime law.

Irwin v. Eagle Star Ins. Co., 455 F.2d 827, 829 (5th Cir. 1972).

In particular, where interpretation of a marine insurance policy's Protection and Indemnity (P & I) clause is in issue, as here:

> In the absence of specifically controlling federal authority, the law of the state where a marine insurance contract is issued and delivered governs the construction of its language.

Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1976).

In its petition for a writ of certiorari INA asserts at page 9 that the Washington Court of Appeals recognized that certain federal cases held that the P & I clause would be inapplicable to losses incurred under similar circumstances involving commercial vessels. These cases are cited at footnote 5 on page 10 of INA's Petition. However, examining the opinion of the Washington Court of Appeals at page A-4, it is apparent the state court merely cited INA's argument that with a commercial vessel the P & I clause would provide no coverage. Thus the Washington court did not specifically decide that controlling admiralty law existed even for commercial vessels. The court stated at page A-4:

> We reject INA's argument because, at least in the non-commercial field, there is no well established federal rule, and without such a rule, the interpretation of marine insurance policies is left to the states.

The federal cases involving commercial settings were concerned with protection and indemnity clauses phrased in terms of liability arising where the insured becomes liable "as owner of" a particular vessel. Two of the cases involved separate policies on a tow or a barge and a tug. There the courts were deciding whether the insured be-

came liable as owner of the barge, on the one hand, or the tug, on the other. These cases are *Dow Chemical Co. v. Tug Thomas Allen*, 349 F. Supp. 1354 (E.D. La. 1972) which involved a tug owner navigating through a field of underwater gas lines without benefit of a chart, and *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971) which involved a crew member on a utility tender alongside an oil drilling platform. In *Lanasse*, the court in disallowing the claim of the platform owner, Chevron, to coverage under the utility tender's policy, reasoned that Chevron, as an additional insured, did not become liable "as owner" of the utility tender. Instead, Chevron's liability arose out of negligence of a crane operator on its own platform.

A third case cited by INA, *Employers Mutual Liability Ins. Co. v. Aetna Ins. Co.*, 254 F. Supp. 263 (E.D. Mich. 1966), again involving a P & I clause, found that injury to an employee engaged in construction operations on a barge attached by a tow line to a tug was not a liability imposed by reason of ownership of the tug. The construction operations on the barge were wholly disassociated with the operation of the tug.

Wedlock v. Gulf Mississippi Marine Corp., 554 F.2d 240 (5th Cir. 1977) again involved a tug and barge. There an employee fell into a seawater ballast hatch left uncovered on the barge. The court held that the tug owner's insurance policy did not provide protection to the barge owner for his own negligence.

None of the above cited federal cases makes mention of whether federal or state law governs, nor do they dictate a clear federal admiralty rule to control claims here pre-

sented on the INA policy. The instant case does not involve tugs or barges with different owners.

Even if federal law were applied here, the INA policy would still provide coverage. The accident occurred while a guest was assisting one of the owners off the vessel and involved an open utility well used to service the vessel. The activities resulting in injury arose out of yachting and the insured's liability arose "by reason of his interest" in the vessel. If the clause were interpreted to require liability as owner, as in the federal cases cited above, since Mr. Lindrud, the owner, was liable, coverage would apply.

The Washington court has a genuine interest in following its own state law in resolving this dispute between homeowner and yacht insurance carriers for its resident. In *Irwin v. Eagle Star Ins. Co., supra,* the Fifth Circuit court noted the substantial and legitimate interest of the State of Florida in a coverage controversy between a Florida resident and a marine insurer whose policy was delivered in the state, in a case involving the sinking of a yacht in Florida waters. The court commented, at page 830:

> The plaintiff is no itinerant seaman of the class traditionally protected by the federal maritime jurisprudence.

Thus Florida law governed construction of the Inchmaree clause, as to whether a latent defect caused the sinking.

The court need not create additional admiralty rules in this context. "[T]he law of admiralty is specially designed for the shipping industry, not small pleasure boats." *Roberts v. Grammer,* 432 F. Supp. 16, 18 (E.D. Tenn., N.D. 1977). This case involves a dockside injury, to which admiralty jurisdiction does not normally extend. *National Union Fire Ins. v. United States,* 436 F. Supp. 1078 (M.D. Tenn. 1977).

A case involving very similar facts, but where the issue was jurisdiction, not insurance coverage, *Heim v. City of New York,* 442 F. Supp. 35 (E.D. N.Y. 1977), found that an injury caused by unsafe planking on a pier was not within admiralty jurisdiction. The plaintiff argued that the Admiralty Extension Act applied, alleging the accident was "caused by a vessel on navigable water" because the vessel, moored next to the pier, invited the plaintiff, without warning him of the danger, to come across the defective pier to load the vessel. The court reasoned, at page 37,

> Even if it be assumed *arguendo* that so placing the vessel was a sufficiently proximate cause of the injury to support a state law claim against Rogers, I do not believe that it can be said that the injury was "caused by a vessel" within the meaning of 46 U.S.C. § 740, The Admiralty Extension Act of 1948. That Act extended admiralty jurisdiction to injuries "done or consummated on land" but the Supreme Court has held that in determining whether there is admiralty jurisdiction over torts we must look to "the relationship of the wrong to traditional maritime activity." . . . Here the land based injury alleged is the result of a classic non-maritime tort. The injury did not result from the negligent handling of the vessel or any of its gear or appurtenances. In fact the role of the vessel in the chain of events is marginal at best. This is therefore a case where due regard for the states' independence should prompt a federal court scrupulously to confine its own jurisdiction within traditional maritime limits. . . .

CONCLUSION

The instant case involves a marine insurance policy, which although within admiralty jurisdiction, is governed by state law in the absence of specifically controlling federal law. The federal cases cited by petitioner do not involve comparable factual situations. Further, the court need not fashion a new admiralty rule, as the accident involved is outside the scope of traditional admiralty authority and does not involve the shipping industry.

The case presents issues best left to the state courts, which can work out solutions to the great variety of questions presented under yacht P & I clauses. The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1655

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

FARMER'S HOME MUTUAL INSURANCE COMPANY
Respondent.

PETITIONER'S REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION I

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All of the federal cases cited by both INA and Farmer's dealt with construction of the phrase . . . liable "as owner of" a particular vessel (INA Pet. p. 10). Any federal district court (D. Wash.)

sitting in admiralty would apply the legal principles enunciated in those cases and decide that there was no coverage. At the time this case was decided, there was no applicable statute, administrative regulation or judicial decision in Washington law. This is evident from the absence of any such citation in the court's opinion (INA Pet. A1 - A7). The Wilburn case[1] is not authority for the proposition that a state court can formulate new law in such circumstances.

Farmers did not challenge INA's contention that there would have been a finding of no coverage had the matter been adjudicated in the U.S. District Court. There is no reasonable legal basis for such a challenge. Application of the uniformity principle (INA Pet. p. 9) suggests that summary reversal is now in order.

Respectfully submitted,

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[1] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).